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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-109

DEBRA MILLENSON, on behalf of herself and all others similarly situated,

Petitioner

-v-

THE NEW HOTEL MONTELEONE, INC.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The respondent, The New Hotel Monteleone, Inc., respectfully prays that this Court deny petitioner's request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 23, 1973, rehearing denied, May 9, 1973.

QUESTIONS PRESENTED

I. Whether it is a denial of the Equal

Protection Clause of the Fourteenth Amendment for a private corporation to reserve certain accommodations to men only, while making available to both sexes the same type of accommodation.

II. Whether the State of Louisiana, through its Liquor License Law and other regulatory devices, being however neutral with respect to such arrangement of accommodations, is sufficient State involvement to constitute State action.

REASONS FOR NOT GRANTING THE WRIT

I. RESPONDENT HOTEL HAS CHOSEN TO RESTRICT SEATING TO MEN ONLY IN ONE OF ITS NUMEROUS DINING FACILITIES WHICH POLICY IS NOT IN ANY FASHION RELATED TO ANY STATE LAW, ORDINANCE, REGULATION OR ACTIVITY.

The question presented here for review is whether or not the State is the impetus for the distinction established by Respondent, The New Hotel Monteleone, Inc., in restricting sitting to men only in but one of its several luncheon facilities. The Trial Court found that the State was not so involved and dismissed Petitioner's complaint for injunctive relief.

> ". . . that the regulations imposed upon the Monteleone Hotel by the State by virtue of regulatory statutes and licensing statutes is not sufficient involvement." (Appendix, Petition for Writ of Certiorari, page 22.)

The Fifth Circuit Court of Appeals in affirming the decision below held that:

". . . Cursory examination of the state licensing statutes manifestly leads one to the conclusion that they are completely unrelated to the admission policies of the licensees.

The impetus for the Grill's admission policies originated with the hotel and not with the state. Justice Rehnquist's observations in Moose Lodge are equally applicable and decisive of Millenson's contentions . . ." (Appendix, Petition for Writ of Certiorari at page 18.)

The complaint filed in the lower Court alleged that the Petitioner, solely on the basis of sex, was denied seating in the Men's Grill operated by The New Hotel Monteleone, Inc. This denial of seating was further alleged to have effectively denied to Petitioner rights secured by the Equal Protection Clause of the Constitution of the United States.

This action does not arise from any refusal on the part of the Hotel to serve female patrons, but from the Hotel's decision to reserve a certain area of its luncheon facilities for male patrons only, while offering to both men and women the same food and service in other areas of the Hotel. Thus, the Hotel has not chosen to exclude women altogether from its facilities as was the situation arising in Bennet and Seidenberg, infra.

None of the applicable regulatory statutes* authorize or prohibit the alleged discrimination. They deal with matters completely distinct, separate and apart from the alleged discrimination. The mere showing of State involvement with private persons does not establish that private person as an actor under color of law, sufficient to maintain an action under the Fourteenth Amendment.

> "It cannot be disputed that under our decisions private conduct abridging individual rights does no violence to the equal protection clause, unless some significant extent, the State in any of its many manifestations has been found to become involved." Peterson vs The City of Greenville, South Carolina, 82 S. Ct. 1119, 373 U.S. (1963).

For similar results see Adickes vs S. H. Kress & Co. 90 S.Ct. 1598, 398 U. S. 144 (1970); Shelley vs Kraemer, 334 U.S. 1, 68 S. Ct. 836, 93 L. Ed. 1161 (1948); and Moose Lodge No. 107 vs Irvis, 407 U.S. 163, 92 S. Ct. 1965 (1972).

There is not presented here any manifestation of State activity, or State intrusion, which is the absolute prerequisite to establish a claim for relief. There is no State law compelling or forbidding any

*Title 26 of the Louisiana Revised Statutes re The Issuance of Liquor Licenses, Section 56-43 of the New Orleans City Code and Title 47, Section 306 of the Louisiana Revised Statutes re The Collection and Rebate of State Sales Taxes.

Louisiana hotel to segregate part of its restaurant facilities so as to provide service to men only.

The Court below, in dismissing Petitioner's complaint primarily relied on the following language of this Court in Moose Lodge No. 107 vs Irvis, supra.

> "Our holdings indicate that whether the impetus for the discrimination is private, the State must have significantly involved itself with invidious discriminations, Reitman vs Mulkey, 387 U.S. 369, 380 (1967), in order for that discriminatory action to fall within the ambit of the constitutional prohibition."

The Court then went on to say that:

> "...there is no suggestion in this record that the Pennsylvania statutes and regulations governing the sale of liquor are intended,either overtly or coverly to encourage discrimination." (At p. 1972)

Justice Rehnquist, as organ of the Court, emphatically and unequivocably decimates Petitioner's argument that the extensive State regulation of the Petitioner's business activities is alone sufficient to bring the conduct complained of under the prohibitions established by the Fourteenth Amendment of the Constitution.

> "However detailed this type of regulation may be, in some particulars it cannot be said to any way forster or encouraged racial discrimination, nor can it be said to make the State

> in any realistic sense a partner or even a joint venturer in the Club's enterprise." (Moose Lodge at p. 1973)

The conclusion reached by the Court in Moose Lodge, supra, is squarely on point in its application to the instant controversy, to-wit:

> "We therefore hold, with the exception hereinafter noted, the operation of the regulatory scheme enforced by the Pennsylvania Liquor Control Board does not sufficiently implicate the State in the discriminatory guest policies of Moose Lodge, so as to make the latter 'State action' within the ambit of the Equal Protection Clause, Fourteenth Amendment." (At p. 1973)

The exception above referred to deals only with a provision of the licensing board which required that each licensed club shall adhere to all of the provisions of its constitution and by-laws. This exemption is of no moment here.

There are two distinctions between the case at bar and Moose Lodge. The first is that whereas in Moose Lodge, Irvis was denied service altogether, in the case at bar, the Respondent offered to Petitioner service in the general dining room, which strengthens the position of Respondent herein. The other is that in Moose Lodge the facility in question was classified as a private club. The distinction is of no significance because both, the Monteleone Hotel and the Moose Lodge operated under State liquor licenses and Moose Lodge was not decided on the issue

of private club vs public restaurant, but on the issue of State involvement through the granting of a liquor license.

Respondent's reliance upon Bennett vs Dyer's Chop House, 350 F. Supp. 153 (N.D. Ohio, 1972) Seidenberg vs McSorley's Old Ale House, 308 F. Supp. 1253 (S.D.N.Y. 1969) and Burton vs Willmington Parking Authority, 365 U.S. 715, 81 S. Ct. 856, 6 L. Ed 45, is misplaced.

Seidenberg and Bennett, supra, are incompatible with the pronouncement of the Court in Moose Lodge, supra, for the reason that the Court in Moose Lodge clearly held that the mere operation of a business under authority of a State issued liquor license is not a significant State activity so as to bring the license within the preview and the prohibitions established by the Fourteenth Amendment.

Women have never been excluded from Respondent's hotel as was the situation in the Bennett and Seidenberg. The Hotel has only reserved seating in certain areas of its luncheon facilities for men, while offering to both men and women the same service in other areas of the Hotel.

In Burton, supra, the controlling question was whether a restaurant, operating as an integral part of a building, constructed with public funds and maintained by public funds, upon property purchased with public funds, became a significant manifestation of the State so as to bring into play the prohibitions of the Fourteenth Amendment. Those were the facts upon which the Supreme Court based its decision.

The only similarity between Burton and these proceedings is that both deal with a restaurant operation. No other factual similarity exists.

Application of the Civil Rights Act of 1964, 42 U.S.C.A., Sec. 2000 (A) which Section is more commonly referred to as the accommodations section, is unwarranted here because said provision specifically excludes sexual discrimination as re-dressable thereunder. No guarantee has been made with reference to sex under the provisions of the accommodation section. Seidenberg, supra, DeCrow vs Hotel Syracuse, Inc. 288 F. Supp. 530.

Moose Lodge, together with the following authorities, lead to the inescapable conclusion that the petition must be dismissed for lack of requisite state action involved in the distinction drawn by the New Hotel Monteleone.

> "The equal protection clause was designated as a safeguard against acts of the state, and not against the conduct of private individuals or persons. It does not add anything to the rights which one citizen has against another under the Constitution. Private conduct abridging individual rights does no violence to the equal protection clause unless to some significant extent the state in any of its manifestations has been found to have become involved in it." American Jurisprudence 2d, Volume 16, p. 856, verbo Constitutional Law.

The Court in Adickes, supra, said at

page 1611 that:

> "On the other hand Section 1 of the Fourteenth Amendment does not forbid a private party, not acting against a backdrop of state compulsion or involvement, to discriminate on the basis of race in his personal affairs as an expression of his own personal predilections. As was said in Shelley vs Kraemer, supra, Section 1 of 'that Amendment erects no shield against merely private conduct, however discriminatory or wrongful'." 334 U.S., at 13, 68 S. Ct., at 842.

There is herein no State impetus or involvement, rather, the impetus for the distinction in the lounge seating arrangements drawn by Respondent is based upon its desire to remain competitive and increase its business volume. Historically, any restrictions on an individual's right to pursue a private interest has been and must be cautiously and narrowly applied. Recognizing that private conduct may be reasonably controlled by law and Statute, conclusions must be made as to the dividing line where business decisions are to be constrained by constitutional limitations. This Court has drawn that line in Moose Lodge and the instant controversy clearly falls within those guidelines. A decision to the contrary will destroy that dividing line and deny Respondent the right to pursue corporate decisions and policies, not in any way influenced by any intent to discriminate, but solely by economic considerations.

CONCLUSION

WHEREFORE, the premises considered, respondent, The New Hotel Monteleone, Inc., prays that the Court deny petitioner's request for the issuance of a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE

I hereby certify that the foregoing brief in opposition filed on behalf of respondent, The New Hotel Monteleone, Inc., was served on counsel for petitioner, Ruth Bader Ginsburg, Melvin L. Wulf, and Brenda Feigen Fasteau, American Civil Liberties Union, 22 East 40th Street, New York, New York 10016, by depositing in the United States mails, postage prepaid.

New Orleans, Louisiana, this 11th day of October, 1973.

_____
FRANK C. DUDENHEFER, JR.